IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 12 Case
	)	Number 87-11174
ALBERT F. PADGETT	)	
SS# 260-64-6270	)	
Route 1	)	
Avera, Georgia 30802	)	
	)	
Debtor-in-Possession	)	
	)	FILED
	)	at 5 O'clock & 22 min P.M.
ALBERT F. PADGETT	)	Date: 11-30-90
	)	
Movant	)	
	)	
vs.	)	
	)	
JAMES D. WALKER, JR.,	)	
CHAPTER 12 TRUSTEE AND	)	
THE UNITED STATES OF AMERICA	)	
on behalf of THE FARMERS HOME	)	
ADMINISTRATION	)	
	)	
Respondents	)	

ORDER

Albert F. Padgett, debtor-in-possession ("debtor") in this Chapter 12 proceeding seeks an order of this court approving a modification to his confirmed Chapter 12 plan and directing disbursement of funds now held in the registry. James D. Walker, Jr., the standing Chapter 12 Trustee ("trustee") and the United States of America on behalf of the Farmers Home Administration ("FmHA"), a creditor in this case, object to the proposed

distribution of funds and modification. The trustee seeks dismissal.

The facts are not in dispute. By order dated February 2, 1989 the debtor's plan of reorganization under Chapter 12 of title 11 United States Code was confirmed. The plan calls for annual payments to the trustee of at least Thirty Two Thousand One Hundred Thirty-Three and 46/100 ($32,133.46) Dollars to meet (1) annual payments to the holders of allowed secured claims as set forth in the plan, (2) trustee's commission, and (3) a $1,000.00 minimum payment to the holders of unsecured claims. The plan further provides "[p]lus Debtor shall commit to the Plan, during the 3-year terms thereof all of his net disposable income, if any available." The net disposable income is to be distributed to the holders of unsecured claims.

The plan as it pertains to the claim of FmHA provides for a claim in the amount of Eight Hundred Twenty Four Thousand Three Hundred Forty Nine and No/100 ($824,349.00) Dollars. The actual amount of the allowed claim filed was Eight Hundred Twenty Four Thousand Three Hundred Fifty Nine and 06/100 ($824,359.06). The plan provided to split the allowed claim of FmHA, to allow and to pay the sum of Sixty Three Thousand Four Hundred Five and No/100 ($63,405.00) Dollars as a secured claim and the balance to be paid to the extent possible as an unsecured claim. The collateral securing the FmHA's claim to be retained by the debtor consisted of 22 acres of land with house in the 1593rd District G.M. Jefferson

County, Georgia and various described items of farm equipment. The plan provided for the surrender other identified items of farm equipment. The plan further provided "[p]ursuant to Bankruptcy Rule 3012 the debtor moves the court at confirmation to establish the value for collateral held by creditors in the amount shown [in the plan]."

In addition to the collateral retained and surrendered under the plan FmHA held a second deed to secure debt in 559 acres of farmland (hereinafter referenced "farm acreage") owed by the debtor. The first outstanding deed to secure debt covering this acreage was held by Central Georgia Farm Credit Service f/k/a Federal Land Bank ("FLB"). According to the plan, the value of the collateral securing the FLB loan was insufficient to fully collateralize its claim. Therefore, the FmHA's security interest in the farm acreage was valued at zero. Pursuant to Rule 3012 and Bankruptcy Code §506(a), at confirmation this court concluded that the values asserted by the debtor in his plan were valid, approved the values and confirmed the plan. The allowed proof of claim of FmHA provided at paragraph 7 "[t]his claim is a general unsecured claim except to the extent that the security interest, if any, described . . . is sufficient to satisfy the claim." Following plan confirmation and in accordance with an order granting relief from stay, FLB foreclosed its security interest in the farm acreage. The foreclosure sale resulted in a surplus of Forty-Two Thousand Four Hundred Ninety-One and 34/100 ($42,491.34) Dollars following

the satisfaction of the FLB debt. The current dispute between the parties involves the distribution of this sum now held in the registry of this court.

The debtor proposes in his plan modification that the fund be paid over to the Chapter 12 trustee to fund the delinquent December, 1989 plan payment with the balance to be applied as this court deems appropriate. FmHA contends that as the holder of a second security deed covering the foreclosed farm acreage, under applicable state law and in accordance with the terms of its security instruments it is entitled to these proceeds. The Chapter 12 trustee contends the entire fund represents disposable income to be distributed to the unsecured creditors and may not be utilized to fund the delinquent December, 1989 plan payment.

Under applicable Georgia law, there is no question that the junior lien holder would have a priority right to the surplus fund following foreclosure. 2 Pindar, Georgia Real Estate Law and Procedure, §20-63 (3rd ed. 1986). Where land is sold under a power of sale contained in a deed to secure debt, and the sale produces a sum in excess of the debt secured by the deed such surplus funds retain the character of real estate insofar as junior lien holders are concerned. Cheek v. Savannah Valley Production Credit Association et al., 244 Ga. 768, 262 S.E.2d 90 (1979); Stone v. Davis, 242 Ga. 17, 247 S.E.2d 756 (1978); East Atlanta v. Limbert, 191 Ga. 486, 12 S.E. 865 (1941). While it is clear under applicable state law that FmHA would be entitled to the excess foreclosure

proceeds, the Bankruptcy Code permits a plan of reorganization under Chapter 12 to modify the rights of holders of secured and unsecured claims. 11 U.S.C. §1222(b)(2)[1].

At confirmation hearing and pursuant to Bankruptcy Rule 3012[2] this court held a hearing to determine the value of co~lateral held by creditors to secure their allowed claims. The valuation hearing was conducted and pursuant to 11 U.S.C. §506[3] this court

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[1]11 U.S.C. §1222(b) (2) provides:

> (b) Subject to subsections (a) and (c) of this section, the plan may -
> (2) modify the rights of holders of secured claims or the holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

[2]Bankruptcy Rule 3012 provides:

> The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct.

[3]11 U.S.C. §506 provides:

> (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use

determined the extent to which the allowed claim of FmHA was a secured claim. FmHA did not oppose the valuations established by the debtor in the plan. The debtor now contends that 11 U.S.C. §1227[4] disposes of this matter. According to the debtor the

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> of such property, and in conjunction with any
>
> hearing on such disposition or use or on a plan affecting such creditor's interest.
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> (b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.
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> (c) The trustee may recover from property securing an allowed secured claim of reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.
>
> (d) To the extent that a lien secured a claim against the debtor that is not an allowed secured claim, such lien is void, unless -
> (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
>
> (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

[4]11 U.S.C. §1227 provides:

> (a) Except as provided in section 1228(a) of this title, the provisions of a confirmed plan bind the debtor, each creditor, each equity security holder, and each general partner in the debtor, whether or not the claim of such creditor, such equity security holder, or such general partner in the debtor is provided for by the plan, and whether or not such creditor, such equity security holder, or such general

confirmed plan provided that following a determination as to value of collateral held by creditors, the secured creditors retain the liens securing their claims to the extent of the value of-their collateral. As to FmHA following confirmation its allowed secured claim of Sixty Three Thousand Four Hundred Five and No/100 ($63,405.00) Dollars was collateralized only by the retained farm equipment and house with 22 acres of land. As this property represented the only collateral securing its claim FmHA no longer retained any lien interest in the foreclosed property and therefore has no lien interest in the surplus foreclosure fund. The debtor's analysis ignores the plan language of §1227 and the order of confirmation.

Bankruptcy Code §1227(a) provides that the provisions of a confirmed plan bind the debtor and each creditor. The order of confirmation is res judicata as to all justiciable issues decided

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> partner in the debtor has objected to, has accepted, or has rejected plan.
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> (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
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> (c) Except as provided in section 1228(a) of this title and except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

and is not subject to collateral attack. In re: Simmons, 765 F.2d 547 a 557-558 (5th Cir. 1985) [citing In re: Lewis, 8 B.R. 132 (Bankr. D. Id. 1981)][5] 5 Collier on Bankruptcy ¶1327.01 (L. King 15th ed. 1989). The order confirming this Chapter 12 plan provides at paragraph 6: "[t]he amount of payments to creditors, the value of collateral set forth in Debtor's plan, and the allowed amount of secured claims held by secured creditors are subject to modification during the pendency of this case pursuant to 11 U.S.C. Sections 1229, 502(j) and 506(a)."

The order of confirmation contemplates the possibility of modification under circumstances similar to those now under consideration. While FmHA has not formally moved for modification of the values established under §506(a) nor sought reconsideration of the secured/unsecured split of its allowed claim under §502(j)6,

[5]Because Chapter 12 was modeled on Chapter 13 and because so many provisions are identical, Chapter 13 cases construing provisions corresponding to Chapter 12 provisions may be relied on as authority in Chapter 12 cases. 5 Collier on Bankruptcy ¶1200.01 (L. King 15th ed. 1989).

its opposition to the proposed modification raises the issue of whether in the interest of justice and in accordance with basic principles of equity this court should reconsider its previous determination of the value of the collateral securing the FmHA claim and the amount of the secured portion of the allowed claim in this case as contemplated under the order of confirmation. Securities & Exchange Comm. v. United States Realty & Improvement Co., 310 U.S. 454, 455-7, 60 S.Ct. 1044, 1053, 84 L.Ed. 1293 (1430) (a bankruptcy court is a court of equity and is guided by equitable doctrines).

But for the intervention of this bankruptcy proceeding, under applicable state law FmHA was entitled to the excess foreclosure sale proceeds. At the time of filing of this bankruptcy case the second in priority lien against the farm acreage securing the debt due FmHA was valid and enforceable. To find that the order of confirmation divested the lien would render the specific language of the order of confirmation meaningless. As the order of confirmation contemplated the possible reconsideration of the value of collateral and amount of allowed secured claim, the order of confirmation did not divest the lien establishing the interest of FmHA in the property. The lien survived confirmation, FmHA's security interest extends to the fund, and under applicable State

law FmHA is entitled t the fund. In re: Roberts, 91 B.R. (Bankr. E.D. Mo. 1988): Bodeker v. Jordan (In re: Jordan) 79 B.R. 843 (E.D. Mo. 1986)

In addition to requiring reconsideration of this court's previous determination of value of collateral securing the FmHA claim and the amount of its allowed secured claim, basic principles of equity also prevent approval of the debtor's proposed modification. The debtor seeks to use 11 U.S.C. §1227 to enforce the provisions of the plan in opposition to the position of FmHA while the debtor ignores the provisions of the plan that requires him to make periodic plan payments. The debtor is in default under the terms of the confirmed plan and basic principles of equity do not permit him to invoke provisions of his confirmed plan and ignore his own default under the very terms of the plan. Accord, Citizens Bank of Americus v. Kennedy (In re: Kennedy) 79 B.R. 950 (Bankr. M.D. Ga. 1987).

This court having determined that the lien of FmHA against the farm acreage survived confirmation of the debtor's plan, FmHA's lien attaches to the net foreclosure proceeds now on deposit in the registry of this court. The order of this court confirming the debtor's proposed plan and establishing the value of the collateral securing the allowed claim of FmHA and the amount of its allowed secured claim is ORDERED amended to include the net foreclosure

proceeds. Further ORDERED that the debtor's proposed plan modification is denied.

The failure of the debtor to make the required December 1989 plan payments constitutes a material default by the debtor with respect to the terms of the confirmed plan pursuant to 11 U.S.C. §1208(c)(6). The Chapter 12 Trustee's motion to dismiss is granted. This Chapter 12 proceeding is ORDERED dismissed. The Clerk of this Court is hereby ORDERED and DIRECTED to remit to the United States Attorney for the Southern District of Georgia as attorney for FmHA all funds including all accrued interest, less any applicable fees due the Clerk, held in this matter in the registry of this court.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 30th day of November, 1990.